Lee's Summit Hospital and Health Midwest *and* Nurses United for Improved Patient Care

Medical Center of Independence and Health Midwest *and* Mary Nash. Cases 17–CA–21072 and 17–CA–21220

March 20, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On September 28, 2001, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondents, Charging Party Mary Nash, and the General Counsel each filed exceptions and supporting briefs. The Respondents and the General Counsel also filed answering and reply briefs. In addition, the General Counsel filed a motion to strike Respondents' reply brief, the Respondents filed a response to the motion to strike, the General Counsel filed a surresponse, and the Respondents filed a reply.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] and to adopt the recommended Order as modified[4] and set forth in full below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondents, Lee's Summit Hospital and Health Midwest, Kansas City, Missouri, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally withholding the 2000 annual wage adjustment and any subsequent annual wage adjustments from unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Make whole the unit employees for any monetary losses they may have suffered by reason of the unilateral withholding of annual wage adjustments that the employees would have received from 2000 to the present, with interest, in the manner set forth in the remedy section of the judge's decision.

(b) Within 14 days after service by the Region, post at the Respondent Lee's Summit Hospital the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including

[1] We deny the General Counsel's motion to strike.

[2] The General Counsel and Charging Party Nash have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's conclusion that the Respondent unilaterally withheld the 2000 annual wage adjustment in violation of Sec. 8(a)(5), we do not rely on the judge's speculation as to the Respondent's motivation. As the judge stated elsewhere, "the Respondent's specific intent for withholding the annual wage adjustment is immaterial," citing *Daily News of Los Angeles*, 315 NLRB 1236, 1242 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

In adopting the judge's dismissal of the allegation that the Respondent unlawfully threatened massive layoffs of closure in the event of a strike, we do so solely on the ground that the General Counsel did not meet his burden of proving the allegation by a preponderance of the evidence.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) by unilaterally withholding the 2000 annual wage adjustment, we also adopt his finding that the wage adjustment had become an established pattern and practice over many years, and therefore constituted a condition of employment that the Respondent was not free to change unilaterally. Between 1996 and 1999, the Respondent granted a general wage increase to the employees in all of the Health Midwest health care institutions, including the employees at Lee's Summit Hospital, in the amount of 2, 2.5, 3, and 3 percent, respectively. In each of these years, the Respondent based the amount of the adjustment on a comparison of market wages and the Respondent's profitability for the year. Moreover, we are not required to engage in any guesswork as to whether the Respondent would have exercised its discretion to grant a general wage adjustment in 2000, and if so, how much. This is because the Respondent, in fact, granted a 3-percent general wage increase in 2000 to the employees in all of the Health Midwest health care institutions, except of course the unit employees at Lee's Summit Hospital.

Chairman Battista agrees with his colleagues. He notes, however, that Respondent was not necessarily bound to give a wage increase and to bargain from that point. The Union was certified in April 2000 for the employees at Lee's Summit. The Respondent could have proposed that the past practice be discontinued at Lee's Summit because wages were to be collectively bargained there. Assuming that impasse on this proposal had been reached by September, it would have been lawful for the Respondent to discontinue the practice as to Lee's Summit at that time.

[4] We shall modify the judge's recommended Order in accordance with *Indian Hills Care Center*, 321 NLRB 144 (1996); *Excel Container*, 325 NLRB 17 (1997); and *Ferguson Electric Co.*, 335 NLRB 15 (2001). We shall also substitute a new notice in accordance with *Ishikawa Gasket America*, 337 NLRB 175 (2001).

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2, 2000.

(c) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally withhold the 2000 annual wage adjustment from registered nurses in the following collective-bargaining unit represented by Nurses United for Improved Patient Care:

All full-time and regular part-time registered nurses employed at Lee's Summit Hospital at 530 NW Murray Road, Lee's Summit, Missouri, excluding all other professional employees, office clerical employees, guards and supervisors as defined in the Act and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL make whole the unit employees for any monetary losses they may have suffered, with interest, by reason of the withholding of annual wage adjustments that the employees would have received from 2000 to the present.

LEE'S SUMMIT HOSPITAL AND HEALTH MIDWEST

David A. Nixon, Esq., for the General Counsel.
David L. Wing, Esq., Jeffrey M. Place, Esq., and *Michael F. Delaney, Paralegal* (*Spencer, Fane, Britt & Browne*), of Kansas City, Missouri, for the Respondents.
Joseph L. Hiersteiner, Esq. (General Counsel), of Kansas City, Missouri, for Heath Midwest.
Walter R. Roher, Esq. (Roher & Wood), of Kansas City, Missouri, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Overland Park, Kansas, on August 14, 2001. The charge in Case 17–CA–21072 was filed on the captioned case was filed on February 1, 2001, by Nurses United for Improved Patient Care (Union). Thereafter, on May 17, 2001, the Regional Director for Region 17 of the Board (the Board) issued a complaint and notice of hearing alleging a violation of Section 8(a)(1) and (5) of the Act. The charge in Case 17–CA–21220 was filed by Mary Nash, an individual, on May 31, 2001, alleging violations of Section 8(a)(1) of the Act. Thereafter, on July 16, 2001, the Regional Director issued an order consolidating cases, consolidated complaint, and notice of hearing alleging that Lee's Summit Hospital and Health Midwest and Medical Center of Independence and Health Midwest (Respondents) had engaged in violations of Section 8(a)(1) and (5) of the Act. The Respondents, in their answer to the complaint, duly filed, deny that they have violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel), counsel for the Respondents and counsel for the Union and Charging Party Mary Nash. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Health Midwest is engaged in the business of owning and managing heath care institutions, including Lee's Summit Hospital and Medical Center of Independence, located within the State of Missouri. Health Midwest maintains its office in Kansas City, Missouri. In the course and conduct of its business operations the Respondent Health Midwest annually derives gross revenues in excess of $250,000 and purchases and receives products, goods, and materials valued in excess of $10,000 directly from points outside the State of Missouri. Similarly, Lee's Summit Hospital and Medical Center of Independence are each directly engaged in interstate commerce and each meets the Board's jurisdictional standards for health care institutions. It is admitted and I find that the Respondents Health Midwest, Lee's Summit Hospital, and Medical Center of Independence are, and at all material times have been, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent Lee's Summit Hospital and Heath Midwest unlawfully withheld an annual wage increase from employees in violation of Section 8(a)(5) of the Act, and whether the Respondent Medical Center of Independence and Health Midwest unlawfully threatened employees that reprisals would result if the Union was voted in to their facility, in violation of Section 8)a)(1) of the Act.

B. Facts and Analysis

On April 24, 2000, the Union was certified as the exclusive collective-bargaining representative for all full-time and regular part-time registered nurses employed at Lee's Summit Hospital.

Apparently commencing in 1994, the Respondent Health Midwest, as part of its budgeting process, has determined whether or not to grant a general wage adjustment to all employees of health care institutions under the Health Midwest umbrella, including the employees at Lee's Summit Hospital, and, taking into account market conditions, the amount of the wage adjustment. These wage adjustments are announced and implemented in the early fall of each year. Since 1994, and with the exception of 1995, when no wage adjustment was granted, the Respondent has granted a general wage adjustments each year. Since 1996, and continuing through the year 2000, a period of 5 years, the Respondent has granted a general wage adjustment to all employees at each of its approximately 9 or 10 health care institutions in the amount of 2, 2.5, 3, 3, and 3 percent respectively, with the exception of the Lee's Summit Hospital registered nurses who are represented by the Union, as noted below.

On September 19, 2000, Joseph Hiersteiner, senior vice president and general counsel for Health Midwest, sent an email, entitled "Wage Adjustment" to the Union, that states, inter alia, as follows:

> Today, Health Midwest will announce a wage adjustment, effective with pay periods beginning October 2, 2000, that will affect most employees. Of course at the appropriate time, we will be bargaining all economic issues, including wages, in our negotiations concerning the Lee's Summit Hospital nurses. They will not be receiving an increased [sic] based upon the announcement today.

The Respondent and the Union had commenced bargaining negotiations prior to September 19, 2000, and had agreed to defer economic issues to a later stage of bargaining. On September 25, 2000, during the first bargaining session following the foregoing email to the Union, and prior to the time any economic issues had been discussed, the Union protested the Respondent's action and stated that the unit employees should receive the 3-percent general wage adjustment. The Respondent's chief negotiator, Gina Kaiser, an attorney who was hired to negotiate the contract on behalf of the Respondent, advised the union representatives that the wage increase was appropriately a subject of bargaining and that the Respondent needed to know what the Union's overall economic proposal might be before it could determine whether a 3-percent wage adjustment for bargaining unit employees would be appropriate. Kaiser also stated, however, in the alternative, that if the Union was willing to agree that the 3-percent increase would constitute the first year's increase under the contract, then Kaiser would recommend that the unit employees be given the 3-percent wage adjustment at the same time as the other employees. The Union would not so agree.

Senior Vice President and General Counsel Hiersteiner testified as follows regarding the matter:

> I consulted with people regarding other aspects of the decision and came to the conclusion that because the wage adjustment was a discretionary matter, in fact, it had not been given in one year [1995], that it would be improper for us simply to implement it and that it was a matter that should be covered by negotiations.

It is clear, and I find, that the annual wage adjustment had become an established pattern and practice over a period of many years, and therefore constituted a condition of employment which the Respondent was not at liberty to unilaterally change. The fact that there was some discretion in the amount of the annual increase, and that in fact no increase was granted in 1995, apparently due to economic conditions, is insufficient to alter this finding. During each year since 1994, all the Respondent's employees had been treated identically, and the Respondent was not privileged to change this pattern at its whim in order to give it an advantage at the bargaining table. *Daily News of Los Angeles*, 304 NLRB 511 (1991*); Daily News of Los Angeles*, 315 NLRB 1236 (1994). The Respondent's reliance upon *Stone Container Corp.*, 313 NLRB 336 (1993), is

misplaced.[1] Accordingly, I find that the Respondent's failure to grant the annual wage adjustment to the represented nurses is violative of Section 8(a)(1) and (5) of the Act, as alleged.

While under the circumstances, the Respondent's specific intent for withholding the annual wage adjustment is immaterial,[2] the various explanations provided by the Respondent to justify its conduct do seem to shed some light on its true motive. Thus, Senior Vice President Hiersteiner testified that because he believed the wage adjustment was discretionary, "it would have been improper for us simply to implement it." This testimony strongly presupposes a consistent corollary belief that it would not have been improper to implement it if the Union was agreeable. Here, the Union was not only agreeable but insistent. Therefore, under Hiersteiner's rationale there would seem to be no impediment to the granting of the increase, yet, for an unexplained reason, the Respondent elected not to do so. Further, Hiersteiner's foregoing rationale for withholding the wage increase differs from the explanation advanced by Kaiser, namely, that the automatic granting of the increase would give the Union an advantage and/or the Respondent a disadvantage in bargaining economic issues. The advancing of improbable and inconsistent rationales for particular conduct is suspect, and is supportive of a discriminatory intent.

In May 2001, during the course of Respondent's preelection campaign at Respondent's Medical Center of Independence hospital, Kaiser, on behalf of the Respondent, conducted a series of some seven apparently lengthy meetings among groups of nurses, with approximately 35 nurses in attendance at each meeting. During the presentations by Kaiser, those in the audience would ask questions and Kaiser would answer them. It is alleged that at one of these meetings Kaiser was asked by an employee, Stephanie Srader, who was not a member of the agreed-upon bargaining unit, what would happen in the event of a strike at the hospital. According to the testimony of Mary Nash, Cara Busenhardt, and Jo Ann Still, all of whom are active union supporters, Kaiser succinctly replied, without elaboration or explanation, that in the event of a strike there could (or would) be massive layoffs and the hospital could (or would) close.

Kaiser, Teddy Jackson, regional director for human resources, and Michelle Smith, vice president for patient services, recalled that someone asked a question about what would happen at the hospital in the event of a strike. Each testified that Kaiser responded by stating that in the event of a strike by the RNs, and if there were a decrease in census or patients to be cared for at the hospital, there was the possibility that there would be layoffs and that the staff could be redeployed to other Health Midwest hospitals. Nothing was said about "massive" layoffs or "closure" of the hospital.

After carefully considering the testimony of each of the witnesses, and the parties' very comprehensive briefs on this issue, find that each of them were attempting to give a truthful account of Kaiser's statement to the best of their recollections. It seems likely that if Kaiser did make such a statement to the effect that, without more, a strike would result in massive layoffs and closure of the hospital, in other words, threaten to close the hospital in the event of a strike, those active union proponents in attendance, who apparently were not hesitant to speak up at the meeting and in fact did so, would have asked Kaiser to elaborate; the fact that they did not speak up indicates that they did not take the statement as a threat. Nor was employee Srader, who asked the question, called as a witness by either party. Indeed, Srader, who was not included within the bargaining unit, might be a most disinterested witness and the most likely person to have listened attentively to the response. Under the circumstances, I am simply unable to determine precisely what Kaiser said in response to the question. Accordingly, I shall dismiss this allegation of the complaint.

CONCLUSIONS OF LAW

1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the exclusive bargaining representative of Respondent's employees in the following appropriate unit:

> All full-time and regular part-time registered nurses employed at Lee's Summit Hospital at 530 NW Murray Road, Lee's Summit, Missouri, EXCLUDING all other professional employees, office clerical employees, guards and supervisors as defined in the Act and all other employees.

4. By unilaterally withholding the 2000 annual wage adjustment from unit employees the Respondent has violated and is violating Section 8(a)(1) and (5) of the Act as set forth herein.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) and (5) of the Act, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. It is recommended that the unit employees be made whole for the 2000 annual wage increase they would have received, and for any other increase in wages that would have automatically resulted from timely receiving the 2000 annual wage increase. The amounts shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, the Respondent shall be required to post an appropriate notice to employees.

[Recommended Order omitted from publication.]

[1] See the Board's discussion and analysis of *Stone Container* in *Daily News of Los Angeles*, 315 NLRB 1236, 1240 (1994).

[2] See *NLRB v. Katz*, 396 U.S. 736 (1962).